

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES
NEW YORK BRANCH OFFICE

MILFORD MANOR NURSING &
REHABILITATION CENTER

and

Case 22-CA-26745

SEIU 1199 NEW JERSEY HEALTH CARE
UNION, AFL-CIO

Robert Gonzalez, Esq., for the General Counsel.
David Jasinski, Esq. and *Peter Dugan, Esq.*,
for the Respondent.

DECISION

Statement of the Case

D. BARRY MORRIS, Administrative Law Judge: This case was heard before me in Newark, NJ on June 7 and 17, 2005. Upon a charge filed on January 18, 2005, a complaint was issued on March 31, 2005 alleging that Milford Manor Nursing & Rehabilitation Center ("Respondent" or "Milford Manor") violated Section 8(a)(1) and (5) of the National Labor Relations Act, as amended (the "Act"). Respondent filed an answer denying the commission of the alleged unfair labor practice.

The parties were given full opportunity to participate, produce evidence, examine and cross-examine witnesses, argue orally and file briefs. Briefs were filed by the parties on July 29, 2005.

Upon the entire record of the case, including my observation of the demeanor¹ of the witnesses, I make the following:

Findings of Fact

I. Jurisdiction

Respondent, a New Jersey corporation, with an office and place of business in West Milford, NJ, has been engaged in the operation of a nursing home providing inpatient medical care. It has been admitted, and I find, that it is an employer engaged in commerce within the

¹ Credibility resolutions have been based on the witnesses' demeanor, the weight of respective evidence, established or admitted facts, inherent probabilities, and inferences drawn from the record as a whole.

meaning of Section 2(2), (6) and (7) of the Act. In addition, it has been admitted and I find that SEIU 1199 New Jersey Health Care Union, AFL-CIO (the “Union”) is a labor organization within the meaning of Section 2(5) of the Act.

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II. The Alleged Unfair Labor Practice

A. The Facts

10 Since March 1989 the Union and Respondent have been parties to successive collective bargaining agreements (“CBA”), the most recent of which expired on March 31, 2005. The CBA includes a Memorandum of Agreement (“MOA”) executed by the parties on December 14, 2002 which provides that Respondent “may increase the percentage of Agency employees to no more than 40%”.

15 On January 7, 2004² the Union filed a grievance alleging that Respondent violated the CBA by employing temporary agency workers in excess of the 40% permitted by the MOA. By letter dated May 11 the Union requested information from Respondent including a list of each occasion that Respondent used agency personnel, the total number of hours paid to bargaining unit employees, the reasons why bargaining unit personnel were not used and
20 the name of each agency used, together with the amounts paid to the agencies. On May 27 Milford Manor responded to the letter by supplying some of the information requested.

After the May 27 response, Larry Alcott, a Union representative, spoke with counsel for Respondent, David Jasinski. Alcott told Jasinski that the information supplied was “not
25 responsive”. On June 28 Jasinski sent Alcott a list of agency personnel who were used at Milford Manor. There were further telephone conversations during which Alcott told Jasinski that the information supplied was insufficient. Jasinski replied that the May 11 request constituted a “fishing expedition”, to which Alcott said that he would redraft the Request “tailored” to the specific information that was needed. On July 23 the Union sent a new
30 Information Request to Respondent.

The arbitration commenced on October 13. Helen Wrobel, counsel for the Union, asked for the balance of the information requested. Respondent’s position was that “they did not have the documents that we had requested. They had provided us with whatever they had...they did
35 not have additional information...It was not kept by them. It was agency records”. The Arbitrator ruled that Respondent had thirty days to provide the additional information to the Union.

On November 23 Ms. Wrobel wrote to Arbitrator Restaino pointing out that Respondent still had not supplied all of the information requested. A second day of hearing was then
40 scheduled for January 31, 2005. At the arbitration hearing held on January 31 Respondent furnished additional information. Jasinski stated that “they do not have access to all of the documents”. The Arbitrator ruled that Respondent was to make available its books and records “for the Union to conduct an audit”. The Union never conducted the audit, claiming that it did not have an auditor available to conduct the examination.

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B. Conclusions

As part of its duty to bargain in good faith, an employer must comply with a union’s request for information, including information relevant to the processing of grievances.

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² All dates refer to 2004 unless otherwise specified.

Stevens International, 337 NLRB 143, 150 (2001). I find that the information requested by the Union in its letter of July 23 was necessary and relevant for the Union to perform its duties as exclusive bargaining representative of its unit employees. See *Lenox Hill Hospital*, 327 NLRB 1065, 1068-69 (1999).

Respondent contends that it produced all of the information that it had in its possession but could not produce the information which was in the agency's possession. A similar argument was made in *United Graphics*, 281 NLRB 463, 466 (1986), and was rejected by the Board. The Board stated (*id.*):

We further find that the Respondent's other defense based on nonpossession of the requested information is without merit. The Respondent has stipulated that Personnel Pool provides it with the names of the temporary workers. As for the other information requested, there is no evidence that Respondent has requested Personnel Pool to provide it with the information that the Union has sought. The Respondent thus has failed to demonstrate that such information is unavailable.

As in *United Graphics*, Respondent has failed to demonstrate that the information that it did not supply is unavailable. Accordingly, I find that Respondent, by failing to supply all of the information requested by Respondent's letter of July 23 has violated Section 8(a)(5) and (1) of the Act.

III. Motion to Defer to Arbitration

In its brief, for the first time, Respondent argues that this matter should be deferred to arbitration, pursuant to *Spielberg Mfg. Co.*, 112 NLRB 1080(1955). Respondent did not assert this as an affirmative defense in its Answer. At no time during the hearing did Respondent assert this as a defense. Thus, General Counsel was never given the opportunity to litigate the matter or present any arguments as to whether this proceeding should be deferred to arbitration. Not only has this motion not been "fully litigated", it in fact has not been litigated at all. Accordingly, the motion to defer to arbitration is denied. See *Maintenance Service Corp.*, 275 NLRB 1422, 1425 (1985); *Union-Tribune Publishing Co.*, 307 NLRB 25, n. 2 (1992).

Conclusions of Law

1. Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6) and (7) of the Act.

2. The Union is a labor organization within the meaning of Section 2(5) of the Act.

3. At all material times the Union has been the exclusive collective-bargaining representative of the employees in the appropriate unit.

4. By failing to furnish all of the information requested in the Union's letter dated July 23, 2004, Respondent has engaged in an unfair labor practice within the meaning of Section 8(a)(5) and (1) of the Act.

5. The aforesaid unfair labor practice affects commerce within the meaning of Section 2(6) and (7) of the Act.

The Remedy

Having found that Respondent has engaged in an unfair labor practice, I find that it must be ordered to cease and desist therefrom and to take certain affirmative action designed to effectuate the policies of the Act. Specifically, I shall order that Respondent, on request, furnish to the Union the information in its possession requested in the Union's letter dated July 23, 2004. I shall also order Respondent to make a reasonable effort to secure the other information requested in the letter, and, if that information remains unavailable, to explain or document the reasons for its unavailability.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended:³

ORDER

Respondent, Milford Manor Nursing & Rehabilitation Center, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Refusing to bargain in good faith with the Union by failing to furnish the information requested in the Union's letter dated July 23, 2004.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act:

(a) On request, furnish to the Union the information in its possession requested in the Union's letter dated July 23, 2004.

(b) Make a reasonable effort to secure the other information requested in the Union's letter dated July 23, 2004, and, if that information remains unavailable, explain or document the reasons for its unavailability.

(c) Within 14 days after service by the Region, post at its facility copies of the attached notice marked "Appendix."⁴ Copies of the notice, on forms provided by the Regional Director for Region 22, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by

³ If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

⁴ If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since July 23, 2004.

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(d) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

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Dated, Washington, D.C. , August 18, 2005.

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D. Barry Morris
Administrative Law Judge

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APPENDIX

NOTICE TO EMPLOYEES

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Posted by Order of the
National Labor Relations Board
An Agency of the United States Government

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The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this Notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

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Form, join, or assist a union
Choose representatives to bargain with us on your behalf
Act together with other employees for your benefit and protection
Choose not to engage in any of these protected activities

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WE WILL NOT refuse to bargain in good faith with the Union by failing to furnish the information requested in the Union's letter dated July 23, 2004.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

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WE WILL, on request, furnish the Union the information which we have in our possession requested in the Union's letter dated July 23, 2004 and WE WILL make a reasonable effort to secure the other information, and if that information remains unavailable, we will explain or document the reasons for its unavailability.

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MILFORD MANOR NURSING & REHABILITATION
CENTER

(Employer)

Dated

By

(Representative)

(Title)

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The National Labor Relations Board is an independent Federal agency created in 1935 to enforce the National Labor Relations Act. It conducts secret-ballot elections to determine whether employees want union representation and it investigates and remedies unfair labor practices by employers and unions. To find out more about your rights under the Act and how to file a charge or election petition, you may speak confidentially to any agent with the Board's Regional Office set forth below. You may also obtain information from the Board's website: www.nlrb.gov.

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20 Washington Place, 5th Floor

Newark, New Jersey 07102-3110

Hours: 8:30 a.m. to 5 p.m.

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973-645-2100.

THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE

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THIS NOTICE MUST REMAIN POSTED FOR 60 CONSECUTIVE DAYS FROM THE DATE OF POSTING AND MUST NOT BE ALTERED, DEFACED, OR COVERED BY ANY OTHER MATERIAL. ANY QUESTIONS CONCERNING THIS NOTICE OR COMPLIANCE WITH ITS PROVISIONS MAY BE DIRECTED TO THE ABOVE REGIONAL OFFICE'S COMPLIANCE OFFICER, 973-645-3784.

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